



CALL-IN FORM

For the Attention of: Deputy Director Democratic Services

From: Councillor Lorber

Date: 2 March 2025

Decision(s): Item 5: Operational Property Matters and 776 and 778 Harrow Road Restrictive Covenant(s) Update

Date of decision: Barham Park Trust Committee (24 February 25)

Five non-cabinet members making request, which must include representatives from more than one political group (Note: all five members do not have to be listed on or sign the same form):

	Name of councillor	Signature <i>(only required if submitted in hard copy)</i>
1	Councillor Paul Lorber	
2	Councillor Hannah Matin	
3	Councillor Charlie Clinton	
4	Councillor Sunita Hirani	
5	Councillor Michael Maurice	

Please provide below an explanation as to why you are calling in the decision and if you are calling in all or part of the decision:

(Note: according to the Protocol On Call-in (Part 5 of the Constitution), call-in requests will not be considered valid if they:

- are used as a means of gaining information/understanding or discussing general concerns with Members and officers,*
- duplicate a call-in on the same issue within the previous six months,*
- are based on reasons already discussed by the relevant Scrutiny Committee prior to the decision being made,*
- concern a decision of the Cabinet referring a matter to Full Council for consideration.*
- concern operational management decisions, or*
- are otherwise considered by the Chief Executive to be frivolous, vexatious or clearly outside the call-in provisions.)*

The reasons for the call-in relating to the decisions taken by the Trust Committee on 24 February 2025 are as follows:

(a) Lack of apparent consideration of any of the Charity Commission's (with contribution from LGA) guidance to a Local Authority as charity trustee.

1. If they were considered, there is no evidence. The section of the Report - "*Legal Implications*" – simply refers to the objects of the charitable trust and contains an assertion that the valuation (of the modification of the covenants) is "*consistent with Charity Commission guidance.*" We cannot tell, as the Valuation is exempted from disclosure. No reference is made to considering the interests of the beneficiaries, or if there is a necessity to consult with them, a discretion as to whether to do so, before agreeing to dispose, or a need to give public notice before disposal. These considerations are set out in various guidance documents below. They all contain references to considering the interests of the charity's beneficiaries. These are the residents of Wembley, for whose recreation Titus Barham left Barham Park for their recreation.
2. To evidence the real and known public concern of beneficiaries, we are aware that planning consent 22/4128 (and the immediately previous application which was withdrawn) attracted substantial local opposition - numerous objections from local residents, petitions, representations from 2 local Residents' associations and the local Neighbourhood Forum, from both Sudbury Councillors and the Brent North MP (resident near the park) in the case of the withdrawn application. Both Sudbury Councillors (including the current Cabinet Member for Regeneration) spoke at the June 2023 Planning Committee, requesting rejection of the application. One of the members for Wembley Hill who had a clashing meeting sent in written objections. We can represent local feeling, i.e., the position of the beneficiaries of the Trust who have not been consulted, and were relying on the covenant to protect the Park from development when the planning consent 22/4128 was granted.
3. The Report does not mention the Charity Commission's guidance on the sale of Charity land at <https://www.gov.uk/government/publications/sales-leases-transfers-or-mortgages-what-trustees-need-to-know-about-disposing-of-charity-land-cc28/sales-leases-transfers-or-mortgages-what-trustees-need-to-know-about-disposing-of-charity-land>

It should in the legal implications, as it sets out duties and considerations. From this, we conclude that the transaction is a disposal of land. "*What we mean by 'land' and 'disposal'. 'Land' means any:... ;rights over land such as easements or restrictive covenants*" The benefit of the restrictive covenant forms part of the Trust's land, clearly "designated land" by its purposes. (The Report mentions this status but at no point sets out its view of the legal status, which it should so that it can show the Trust Committee has considered the need to consult (if applicable) before agreeing to dispose and/or give public notice before actual disposal.

The Trustees have always to make sure that a disposal is in the charity's best interests. These are not only financial interests, and, in fact, if financial issues only are considered, a Local Authority appointed trustee (thinking about financial contributions the Local Authority might have to make for the upkeep of the charity land) has to be very careful to avoid conflicts of interest. Similarly,

because the Local Authority is also the planning authority which will make decisions on development of land. The Trustees have to be careful not to treat the Trust's land as the Local Authority's. Because of many recent instances the Charity Commission is dealing with on these very points, a guide has been written by the Charity Commission for England and Wales with the contribution of the Local Government Association, and published in August 2024.

<https://www.gov.uk/government/publications/local-authorities-as-charity-trustees/d41c2473-904d-4bbfb8d3-652591facf21#if-the-local-authority-has-appointed-you-as-trustee>.

From this guide, under the heading "***If the local authority has appointed you as trustee***":

"Local authorities can have the right (under the terms of a governing document) to appoint trustees. Your local authority may have appointed you – a councillor – to be a trustee of a charity. If so:

- ☐ *you, rather than the local authority, are responsible for the administration of the charity, along with your fellow trustees*
- ☐ *you and your fellow trustees are personally liable for the decisions you make*
- ☐ *you must act in the interests of the charity, not those of the local authority*
- ☐ *you do not 'represent' the council on the trustee board"*

This is the governance model adopted for the Barham Trust. The section makes it clear that the individual Trustees are personally legally liable for decisions they make. Having regard to that personal legal liability, it is even more important that the issues we highlight here are the subject of specialist legal advice to the Committee.

4. Case Study 1 is instructive: *"Highton District Council (which is also the planning authority) is trustee of a recreation ground and children's play area located in one of its wards, which is held on charitable trust. The council has been paying out of its corporate funds the maintenance and upkeep of the land. A decision to close the play area and sell part of the land will provide the charity with the funds it needs to maintain the recreation ground. **This means the council can stop subsidising the charity from public funds.** The council must manage the conflict of interest that exists:*

- ☐ ***because it stands to benefit from the disposal – disposing of the land will enable it to stop subsidising the charity***
- ☐ ***because it is the planning authority which will make decisions on how the land can be developed***

If it cannot manage the conflict of interest, the local authority will need authority from the Charity Commission if it wanted to go ahead with the disposal."

Here, the Council as Local Planning Authority **has** already granted the Planning consent, at a time when previous decisions of the Trust at AGMs pre-dating that consent, and the previous withdrawn application, have instructed

officers to open negotiations with Zenastar. The Trust did not comment on the planning applications, despite being invited to do so by beneficiaries concerned at the major development in a corner of the park which would change its character. Even without hindsight, and the benefit of the new guidance, it could now be perceived as a patent conflict of interest between the statutory planning functions, the end of subsidy to Trust funds and the considerations of the Trust. It has been mentioned at the AGM that the Council has to contribute financially to the Trust. These examples of conflict of interest should immediately be referred to the Charity Commission under this latest guidance, before any decision is taken.

5. Trustees have to observe the 7 decision making principles:

<https://www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decisionmaking/decision-making-for-charity-trustees>

Phrases from those 7 principles include :*“ making sure you share all details relevant to the decision”; “ the type and amount of information you will be expected to consider can depend upon: the impact and risks of the decision, including on your charity’s resources, beneficiaries, property or reputation; the cost or value involved; its complexity; whether the decision may be controversial” and “intentionally benefiting someone in a way that is not in your charity’s best interests.”; “You should usually consult stakeholders about important decisions, especially when the outcome will significantly affect them. This might include, for example, your charity’s beneficiaries. Make sure that the people you consult know that the trustees will make the final decision. Conducted well, consultation can: help you understand different views; help you assess the impact of the proposed decision; show that you are open and transparent. Sometimes you are required to consult about your decision, for example, for some land disposals.”*

6. Further the Trustees have to consider the “public benefit” aspect; there is separate guidance on that aspect at <https://www.gov.uk/guidance/public-benefit-rules-for-charities>

See Section 2 *“Be satisfied that the disposal is in your charity’s best interests”*: *“you have a duty to your charity as trustees to ensure that you use reasonable care and skill when disposing of land. Disposing of land may help you to: raise money; But you should also think about how: disposing the land may affect your beneficiaries or affect public support for your charity”*

7. As to the requirements of the Valuation Report in regulation 4 of *“The Charities (Dispositions of Land: Designated Advisers and Reports) Regulations 2023”* <https://www.legislation.gov.uk/uksi/2023/467/regulation/4/made> there is no evidence that the Trust was advised *“whether & , if so, how the relevant land should be marketed”*, considering that there is a “market of one”, with the owner already in place, and the special value attributable to his ownership as connected to the twice yearly fun fair and the avoidance of claims for nuisance.

*“4.—(1) A report prepared for the purposes of section 119(1) of the 2011 Act **must** deal with the following matters— (a)the value of the relevant land; (b)any steps which could be taken to enhance that value; (c)whether and, if so, how*

the relevant land should be marketed; (d) anything else which could be done to ensure that the terms on which the disposition is made are the best that can reasonably be obtained for the charity; and (e) any other matters which the adviser believes should be drawn to the attention of the charity trustees."

8. The above will indicate the complexity of issues that the Trust Committee, members of which are personally liable for the decisions, need to consider. We note that none of these aspects are even mentioned in the report, despite the fact that the Trust's beneficiaries have attempted to take active part in opposing the decision. The Trust may eventually be at liberty still to take the decision it took but its thinking against all the above principles, and dealing with the conflict of interest issues, and its advice should be clear, and recorded in the public domain.

(b) The terms of the Substitute Restrictive Covenant are not certain and do not comply with Planning Consent 22/4214

As to the detail of Decision (1) " *Approve the modification of the restrictive covenants at 776 and 778 Harrow Road, as detailed in paragraphs 3.8-3.11 of the report and delegate authority to the Director of Property and Assets to execute a deed with Zenaster Properties Ltd for the agreed sum of £200,000, subject to (2) below.* " (2) is the approval of the submission of the Valuation Report (which is in a confidential Appendix to the Report).).

The terms of the modification of the current restrictive covenants are imprecise. Major sections are in contravention of conditions of planning consent 22/4128; their terms are stated to be amendable (with no limiting parameters) by officers with no reference back to the Trust Committee, and no apparent appreciation of the fact that the valuation of consideration to be received by the Trust was (or should have been) based on what the **actual** modification terms are specifically:

- a) We have no means of knowing that the sum of £200,000 represents a correct value for the "modification" of the current restrictive covenants. We do not in fact know what the modification is. The "detail" of the changes was not set out to the Trust Committee. Further, the Valuation report is excluded from the public's (and non-Trust Committee Councillor members') view. We do not know what the precise amendment of the restrictive covenants was that formed the **basis** of the Valuer's opinion of value. However, if the Valuer had precise wording, this should have been set out in the open part of the Report, **and paragraphs 3.9-3.11 are not then accurate**. If the precise wording of the proposed modification of the 2011 restrictive covenants was **not** precisely agreed, and set out in the Valuer's instructions, then the Valuation cannot be robust as an assessment of value of the change.
- b) To illustrate specifically the lack of detail comprised in paragraphs 3.8 – 3.11:
- the Report sets out, at paragraph 3.8, the exact terms of the very detailed restrictive covenants currently binding 776 and 778 Harrow Road ("776/778") imposed under two 2011 Transfer Deeds. Both of these Transfers are appended to the Report. The tight terms of these restrictive covenants are likely to have suppressed the value obtained by the Trust, and even potentially

reduced the market for the 776/778 to a “market of one” - Mr George Irvin who wrote to a Councillor that he “*bought the land to protect the park from overdevelopment, as [he] was under the impression that [the cottages] were going to be replaced with high rise flats and would then end up affecting the annual two funfairs in the park*”. It is notable that, at the time of the sale, the Trust did **not** obtain a Designated Valuer’s valuation in the Charity Commission compliant form and transfer, and the Trust did not seek, still less obtain, any consent from the Charity Commission for the sale of part of the Trust’s permanent endowment, as it should have done. (This was discovered by the Charity Commission some years later, and the Trust directed to ringfence what was left of the proceeds of sale as “restricted funds”, part of the permanent endowment.) There was never, therefore, a Charities Act compliant valuation at the time of the 2011 sale at £620,000. 776/778 was transferred to its current owner, Zenastar Properties in 2016 at a declared value increased by £180,000.

- Paragraphs 3.9 -3.11, by contrast to the detailed 2011 covenants set out in paragraph 3.8 , do **not** set out the exact wording of the new restrictive covenants. The summaries purport to reflect the terms of planning consent 22/4128 but they permit in clear terms the overriding of conditions 3 and 28 in the planning consent - namely the prohibition of extensions or buildings in the curtilage, and the prohibition of any car parking in the development, Condition 28 referring to measures to prevent vehicle parking, and ensuring the car-free status for the lifetime of the development. Paragraph 3.9 refers to a Deed “*to be prepared in accordance with the planning committee report dated 12 June 2023 and decision notice dated 13 June 2023 will amend these covenants to permit the development of four houses.*” Neither the planning report nor the planning consent were drafted to form the basis of any modification of restrictive covenants (the final informative stresses the separate nature of planning and restrictive covenant)> A reference to permitting the development of 4 houses is very wide.
- Paragraph 3.10 then states that the revised version of the restrictive covenant is set out below. However, triggering our concern that the modifications are not fully articulated, and cannot therefore have formed the basis of the Valuation, paragraph 3.10 states that the covenants “*may be subject to further refinement*” presumably by officers. There is no indication how they may be refined by officers in the future, certainly not the subject of approval by the Trust Committee and without any regard for the Valuation and its precise basis, whatever that is.
- Within Paragraph 3.10, under the heading “**Construction of Buildings & Structures**”, the restriction on building in the curtilage is lifted to allow “*garages and outbuildings*”, despite the clear terms of the planning consent conditions above. Under “**Vehicle and Storage Restrictions**”, there should be **no** removal of the current complete “*restriction on standing or supporting vehicles, commercial vehicle trailers, mobile homes, caravans, trailers, carts, or boats on the Property is modified to permit reasonable residential use, including the parking of vehicles by residents and visitors in designated parking areas as approved under planning permission 22/4124*” Again, to do so would completely override Conditions 3 and 28 of 22/4128. This cannot be agreed. “Designated parking areas” were not agreed and were specifically

prohibited. Under the heading "**Permitted Development**", the restriction on carrying out development should not be removed but only modified in so far as necessary to permit the development under 22/4128. Under the heading "**Accessway and Parking Restrictions**", again "*restriction on parking and obstruction of the accessway hatched yellow and hatched green or any part of the Retained Land is modified to allow **vehicular and** pedestrian access as required for the lawful residential use of the Property, ensuring that any access arrangements comply with planning permission 22/4128 and any subsequent highway or planning authority requirements*" > This comprehensive lifting of restrictions on the accessway, over which only defined easements are granted by the 2011 Transfers is completely unacceptable. The access road is not part of 776/778, it is in the park and therefore part of the Trust's assets. First, it again contradicts the clear vehicle free specified status of the development under 22/4128. It purports to authorise the residents of the development to park on land over which it is only granted rights, and to "**obstruct**" a jointly used accessway. Confusingly, this section of the Report then refers to ensuring "access arrangements" comply with the planning consent, which may be an attempt to recognise this problem. However, we believe that this section of 3.10 must be completely deleted. If there can be no vehicular access, the section has no effect but its presence opens up vehicular use on the easement land. As it is also subject to change "*if highway or planning requires*", it is not certain and therefore no basis for a robust Valuation.

- Finally, on the terms of the modification of restrictive covenants, on which the Valuation is based, paragraph 3.11 introduces even more uncertainty: "*The precise wording of the changes may be further refined or amended during the legal conveyancing process*". If that is the case, how may the valuation be affected, and how will the changes be authorised? Since they go to the heart of value, Trustees cannot derogate their trustee responsibility and delegate to "*the legal conveyancing process*". This seems to mean delegated to an officer but the Trust Committee cannot delegate to an officer; changes have to be instructed, and advice must be sought.

(c) No information given to Trustees of costs incurred and/or estimated to be incurred to give a likely net figure of receipt for modification

There is no clarification of any costs of the Valuation or other costs (including legal) of the disposal which would be deducted from the Trust's receivable figure of £200,000. The Trust Committee is not provided with any details of the net figure the Trust will receive, in order to assess the financial benefits of the transaction (which are a part of the assessment of the benefits to the Trust and the public benefit test).

(d) The Plan embedded in the report is incorrect

The plan embedded in the Report is incorrect. The Supplemental Report to Planning Committee on June 12 2023 set out a dispute with the applicant about the extent of the land comprised in 776/778. It recorded a substitute plan with blue edging (but the same numbering 1463 100-Rev E) to reflect the correct extent of 776/778's boundaries, and a reduced width and length of the accessway from that shown on the application "proposed site plan" over which the easement of access was granted by the 2011 Transfers. (The Report refers

to its resolution, by reference to agreed surveyor's aerial plan signed by George Irvin on behalf of Zenastar Properties on 28 August 2024 (paragraph 3.14)). As the wrong version of plan 1463 100-Rev E (with no blue edging) is in the Report, there is an implication that a wider access is being granted. This would be an extension to the right of way over the Trust land, and would be a disposal of designated land, needing a further valuation, and considerations of consent, consultation and public notice referred to in the guidance documents referred to in Section A above. This needs to be corrected.

(e) Decision (3) Approval of increase in allocated Funding for Year 1 Work to account for VAT

There have always been substantial works to the building and the issue of VAT has not previously arisen. The report mentions that tree-works ("non-business works") do not attract VAT.

There is no exploration in the Report of the possibility of electing the buildings for VAT. It is possible for charities to do so. We acknowledge that the issue of VAT on buildings is a complex issue. Advice should at least be sought on this possibility, and advantages and disadvantages explored, if possible. (e.g., VAT could be recoverable; rents will become liable for VAT, adding to tenants' burdens.) However, the Trust could then weigh these, rather than agreeing a yet further draining of Trust's diminishing resources.

(f) Re gear of ACAVA Lease

ACAVA appear to be in arrears; there is no provision in their Lease for a partial break clause, so it has no right to request a partial surrender. There is no obligation on the Trust to agree a partial surrender of the ACAVA demise just because ACAVA no longer has a need for the unit. The Trust should not agree this unless and until the arrears are fully cleared, a market assessment of the value of Unit 6 is obtained, confirmation that there will be no reduction in rental income if a back-to-back letting to a new tenant of Unit 6 can be secured. The Trust should only accept a surrender back-to-back with such a new letting. It cannot be in the best interests of the Trust to allow a reduction in income by any criterion of Trustees' considerations of the best interest of the Trust.

(g) Unit 8 and Council's proposal to end its occupation

Although this matter was only for noting by the Trustees, we wish to record our concern that no objection was taken to the apparent proposal by the Council to vacate on 3 months' notice or that the Trust might have agreed a surrender, especially as the Council proposes to leave Young Brent Foundation (YBF) in occupation, and we have just ascertained that YBF is hiring out space to other charities. The Trust should not simply agree this. It will be a reduction in income; it has not previously been flagged as a possibility in any AGM; if the Council vacates, it will trigger a payment by way of clawback under the Sure Start grant scheme which will be payable by the Council which is of concern to us as Councillors. (recently, the sum was quantified at £93,000, although it decreases as the 25-year grant period expires). As mentioned, there was no indication at the September 2024 meeting that the Council proposed to vacate. The Trust should not in any event permit this if full vacant possession is not

granted. We wish to record our disappointment that, after approximately 4 years of the Trustees being told at AGMs that YBF were taking a sublease, they remain in informal occupation of a trust asset, permitted by the Council. Since the arrangement was never regularised, we are further disappointed that the Council did not receive rent to mitigate its own rental payments for Unit 8 at £11,300 per annum.

Please provide below an outline alternative course of action to the decision being called in:

In view of the issues highlighted above, the decisions made by the Trust Committee on the Operational Property Matters and 776 and 778 Harrow Road Restrictive Covenant(s) be referred back for reconsideration with the following action being sought as a result:

- (1) The Trust should refer to the Charity Commission as to the conflicts of interest which have already arisen as a result of the grant of consent 22/4128, the stopping of any Council subsidy to the Trust from the sale price and the current decision without regard to such factors, in light of the August 2024 Guidance issued by the Charity Commission and report to Barham Trust.
- (2) Dependent on the result of that referral, if the transaction is to proceed, the Trust should obtain specialist legal advice on (a) whether the release (in whole or in part) of the 2011 restrictive covenants is a disposal of designated land; and (b) whether consultation should be undertaken with the Trust's beneficiaries and anyone else who may be affected by the disposal prior to making a decision; (c) whether public notice has to be given before disposal and, as appropriate, consult and/or give public notice before disposal; and , if either (b) and/or (c) is a matter of discretion , that such discretion should be exercised to ensure that the beneficiaries are given full opportunity to contribute their views.
- (3) The Trust should reconsider the proposed modification of restrictive covenants based on the Charity Commission's advice as to the best interests of the Trust (extending, as they do, beyond financial interests), and having regard to the recently updated guidance of August 2024 to local authorities as to conflicts of interest (e.g. considering the Council's standing to benefit by the Council being able to stop subsidising the Trust from public funds, its role as planning authority in granting consent 22/4128, including having regard to policy such as housing provision). The Trust Committee should be advised on all the aspects of the decision-making process for Local Authority charity trustees and the decision remitted until (as appropriate) issues of conflict have been resolved, any consultation and/or notice requirements ascertained, carried out and weighed up as against the net financial benefit, and the final form of the restrictions are agreed and the revised Valuation obtained
- (4) Subject to the outcome of the matters set out in (1), (2) and (3) above, the Trust should procure the drafting of the precise wording of the new restrictive covenants and how they will substitute the existing covenants, and new instructions on the basis of the revised wording should be given to the Valuer to provide a fresh valuation. The terms of both should be in the public domain.

- (5) The Trust should ascertain the costs of dealing with the substitution of the restrictive covenants and costs of all the other advice obtained and to be obtained and should make the information available to the Trustees as they take any new decision.
- (6) The Trust should clarify whether the development in accordance with 22/4128 requires a wider accessway, and, if so, consult and/or give public notice before disposal as appropriate.
- (7) The Trust should obtain advice as to whether it can elect the buildings for VAT, and the Trustees should then consider the advantages and disadvantages if the Trust is legally able to opt to tax.
- (8) The Trust should defer re-gearing ACAVA's lease pending a marketing exercise for Unit 6, the possibility of a back-to-back letting to a third party of Unit 6 at no loss of income to the Trust and completion of such a back-to-back letting.
- (9) The Trust should ascertain the precise position as to occupations within Unit 8 before agreeing to accept as valid a S 27 Landlord & Tenant Act 1954 notice or agreeing a surrender from the Council and, if early termination is not agreed, the Trust should procure the regularisation of the occupation by YBF by sublease as instructed in previous AGMs

Please return this form to a representative of the Deputy Director Democratic Services, by email (from your individual email address) james.kinsella@brent.gov.uk at or in hard copy (with signatures) and in person to the Governance Team on the fourth floor of Brent Civic Centre.